Appellee's Brief

3

No. 81-9

Office - Supreme Court, U.S.
FILED
JAN 29 1982
ALEXANDER ... CLERK

In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

---

815 Fourth Avenue North
Seattle, Washington 98109
(206) 587-4272

MICHAEL W. HOGE*
General Counsel
Seattle School District No. 1

1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400

CAMDEN M. HALL, P.S.*
G. RICHARD HILL
Foster, Pepper & Riviera
Special Counsel for all School District Plaintiffs

1900 Washington Building
Seattle, Washington 98101
(206) 682-8770

DAVID J. BURMAN
Perkins, Coie, Stone, Olsen & Williams
Special Counsel for Seattle School District No. 1

*Counsel of Record

QUESTIONS PRESENTED

1. Does a state statute—Initiative 350—requiring assignment of students to the nearest or next-nearest school embody a suspect racial classification when it contains exceptions for all common forms of student assignment except racial desegregation, specifically prohibits all means of desegregation other than transfers at students' option, and concededly was enacted to terminate a school district's mandatory desegregation program?

2. Does substantial evidence support the finding by the District Court, after nine days of trial that created over 2000 pages of transcript and over 250 exhibits, that discriminatory purpose was a factor in the adoption of Initiative 350?

3. Does a state's prohibition of local school districts' assignment of students to non-neighborhood schools for desegregation, except where ordered by a court, interfere with satisfaction of the affirmative federal duty to desegregate?

4. Does protection of the constitutional rights of school children by school districts, school board members, and private citizens constitute a special circumstance rendering an award of attorney's fees unjust?

TABLE OF CONTENTS

Jurisdiction 1

Statement of the Case 1

A. Introduction 1
B. Historical Background 2
C. The Seattle Plan 4
D. Origin and Passage of Initiative 350 7
E. The Initiative 350 Lawsuit 10
F. The District Court's Decision 10
G. The Court of Appeals' Decision 12

Summary of Argument 14

Argument 16

A. Initiative 350 Embodies a Racial Classification Disadvantaging Minorities 16

1. *Hunter* and *Lee* 16
2. Initiative 350's Race-Consciousness . . 18
3. Overt v. Covert Classifications 21
4. Necessity of Further Proof of Purpose 23
5. Conclusion 24

B. Discriminatory Purpose Was a Factor In Intitiative 350's Adoption 25

1. Segregative Impact 25
2. History and Context of the Initiative's Adoption 27
3. Lack of Relationship Between Means and Permissible Ends 30
4. Subjective Motivation 32
5. Conclusion 34

C. Initiative 350 Deters Satisfaction of the Affirmative Duty to Remedy Past Segregation 34

1. The Affirmative Constitutional Duty . 35
2. Necessity of "Busing" 36
3. The "Saving" Construction of Initiative 350 38
4. Initiative 350 Is Facially Overbroad . . 41
5. Initiative 350 Is Preempted By Federal Legislation 42
6. Conclusion 44

D. The Court of Appeals Correctly Found the Successful School District Plaintiffs Entitled to Their Costs and Attorney's Fees 44

1. Statutory Bases for Award of Attorney's Fees 45
2. An Award of Fees Serves the Congressional Purposes 46
3. No Special Circumstances Exist Here . 47
4. An Award Is Due Other Plaintiffs . . . 49

Conclusion 50

TABLE OF AUTHORITIES

Cases

Ambach v. Norwick, 441 U.S. 68 (1979) 27

Anderson v. Martin, 375 U.S. 399 (1964) 19

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 14,24,25,28,30,32,33,34

Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980) 37

Baggett v. Bullitt, 377 U.S. 360 (1964) 41

Board of Education v. Harris, 444 U.S. 130 (1979) 43,44

Brandenburger v. Thompson, 474 F.2d 885 (9th Cir. 1974) 49

Brown v. Board of Education (I), 347 U.S. 483 (1954) 22,26,35

Brown v. Board of Education (II), 349 U.S. 294 (1955) 36

Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980) 34

Buchanan v. Evans, 423 U.S. 963, *aff'g mem.* 393 F. Supp. 428 (D. Del. 1975) 21,22

Carey v. Piphus, 435 U.S. 247 (1978) 46,48

Castaneda v. Partida, 430 U.S. 482 (1977) 20,22

Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972) 3,29

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 4,26,35,37

Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948) 36

Cort v. Ash, 422 U.S. 66 (1975) 29

Crawford v. Board of Education, No. 81-38 37

Dandridge v. Williams, 397 U.S. 471 (1970) 42

Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979), *cert. denied*, 450 U.S. 919 (1981) 46-47

Dayton Board of Education (I), 433 U.S. 409 (1977) ... 35

Dayton Board of Education v. Brinkman (II), 443 U.S. 526 (1979) 4,35,37

DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974) 24,25

Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980) 47,48

Department of Revenue v. Hoppe, 82 Wash. 2d 549, 512 P.2d 1094 (1973) 21

Donaldson v. O'Connor, 454 F. Supp. 311 (N.D. Fla. 1978) 47

Fleming v. Nestor, 363 U.S. 603 (1960) 33

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 32

Fullilove v. Klutznick, 448 U.S. 448 (1980) 43

Gooding v. Wilson, 405 U.S. 518 (1972) 41

Goss v. Board of Education, 373 U.S. 683 (1963) 19

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 2

Green v. County School Board, 391 U.S. 430 (1968) . . . 36

Guinn v. United States, 238 U.S. 347 (1915) 22,23

Hall v. Cole, 412 U.S. 1 (1973) 47

Hines v. Davidowitz, 312 U.S. 52 (1941) 44

Howard v. Illinois Central R.R., 207 U.S. 463 (1908) . . 39

Hunter v. Erickson, 393 U.S. 385 (1969) 11,16,17,18,19,21,22,23,24

Hutto v. Finney, 437 U.S. 678 (1978) 48

Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974) 47

James v. Valtierra, 402 U.S. 137 (1971) 21

Jenkins v. Anderson, 447 U.S. 231 (1980) 29

Kasper v. Edmonds, 69 Wash. 2d 799, 420 P.2d 346 (1966) 39

Keyes v. School District No. 1, 413 U.S. 189 (1973) 4

Korematsu v. United States, 323 U.S. 214 (1944) 22

Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) 28

Lane v. Wilson, 307 U.S. 268 (1939) 22

Lau v. Nichols, 414 U.S. 563 (1974) 42

Loving v. Virginia, 388 U.S. 1 (1967) 19,24

Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978) 47

Lynch v. Overholser, 369 U.S. 705 (1962) 39

Maher v. Gagne, 448 U.S. 122 (1980) 49

McDaniel v. Barresi, 402 U.S. 39 (1971) 4,18,42

McLaughlin v. Florida, 379 U.S. 184 (1964) 19,22

Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34 (2d Cir. 1978) 47

Milliken v. Bradley (I), 418 U.S. 717 (1974) 36

Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976) 35

NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) 43

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 46

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 42

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 46

North Carolina State Board of Education v. Swann, 312 F. Supp. 503 (W.D.N.C. 1970), *aff'd*, 402 U.S. 43 (1971) 17,36,37,39,41,42

Northcross v. Board of Education, 412 U.S. 427 (1973) 46

Nyquist v. Lee, 402 U.S. 935 (1971), *aff'g mem.* 318 F. Supp. 710 (W.D.N.Y. 1970) 11,16,17,18,19,21,23,24,29

Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959) 17

Orr v. Orr, 440 U.S. 268 (1979) 31

Pace v. Alabama, 106 U.S. 583 (1883) 19

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 22,23,24,25,32

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 31

Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978) ..47

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 23,25,42-43

Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) 47

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 28

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 41

Seattle School District No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) 27,29

Seattle School District No. 1 v. Washington, No. C81-276T (W.D. Wash. Dec. 18, 1981) 38

Smith v. Texas, 311 U.S. 128 (1940) 33

State ex rel. Citizens Against Mandatory Bussing v. Brooks, 80 Wash. 2d 121, 492 P.2d 536 (1972) 28

State ex rel. Day v. Martin, 64 Wash. 2d 511, 392 P.2d 435 (1964) 40

State ex rel. Public Disclosure Commission v. Rains, 87 Wash. 2d 626, 555 P.2d 1368 (1976) 21

Strauder v. West Virginia, 100 U.S. 303 (1880) 22

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 4,18,27,36

Sweatt v. Painter, 339 U.S. 629 (1950) 27

Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975) 47

United States v. Board of Education, 88 F.R.D. 679 (N.D. Ill. 1980) 37

United States v. Carolene Products Co., 304 U.S. 144 (1938) 28

United States v. O'Brien, 391 U.S. 367 (1968) 32

United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972) 35

Vance v. Bradley, 440 U.S. 93 (1979) 24

Vlandis v. Kline, 412 U.S. 441 (1973) 27

Washington v. Davis, 426 U.S. 229 (1976) 21,22,23,24,25

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) 39,43-44

Wright v. Council of Emporia, 407 U.S. 451 (1972) ... 35

Constitutional Provisions

U.S. Const. amend. XIV 10,14,16,45,46

U.S. Const. amend. XV 23

Statutes

Akron City Charter § 137 16

N.Y. Educ. Law 3201(1) (McKinney 1970) 17

Pub. L. No. 95-561 45

20 U.S.C. § 1617 45

20 U.S.C. §§ 1713-14 (1976) 37

20 U.S.C. § 1716 (1976) 37

20 U.S.C. § 3193(b) (Supp. III 1979) 43

20 U.S.C. § 3192(b)(2) (Supp. III 1979) 44

20 U.S.C. § 3205 (Supp. III 1979) 45,46

28 U.S.C. § 1254(2) (1976) 1

42 U.S.C. § 1983 (1976) 45,46

42 U.S.C. § 1988 (1976) 45,46,49

42 U.S.C. § 2000d (1976), ... 3,42

42 U.S.C. § 2000d-6 (1976) 43

42 U.S.C. § 2000h-2 (1976) 10

42 U.S.C. § 2000h-4 (1976) 43

Rules and Regulations

34 C.F.R. § 100.3(b)(1)(iii) (1981) 43

34 C.F.R. § 100.3(b)(2) (1981) 43

Other Authority

Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 Geo. L.J. 1 (1981) 43

G. Allport, *The Nature of Prejudice* (1954) 33

Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978) 28

Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976) 33

Conf. Rep. No. 798, 92d Cong. 2d Sess. (1972) 26

Ely, *Legislative And Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970) 32

J. Ely, *Democracy and Distrust* (1980) 24

H.R. Rep. No. 94-1558 (1976) 46,49

12 *Moore's Federal Practice* § 435.01[2] (1981) 45

Proposed Bills on Court Ordered School Busing—Hearings on S. 528, S. 1147, S. 1647, & S. 1743 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 13

S. Rep. No. 94-1011 46,47,48

A. Siqueland, *Without a Court Order—The Desegregation of Seattle's Schools* (1981) 13

U.S. Commission on Civil Rights, *Public Knowledge and Busing Opposition* (1973) 31

No. 81-9

In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

JURISDICTION

Appellants improperly invoke this Court's jurisdiction under 28 U.S.C. § 1254(2) (1976), as to Appellants' Question VIII. *See* note 44 *infra.*

STATEMENT OF THE CASE

A. Introduction

This statement is drawn from the District Court's findings of fact, 473 F. Supp. 996, J.S. A-1 to A-36 (W.D. Wash. 1979), which the Court of Appeals left wholly undisturbed and in many particulars expressly affirmed, 633 F.2d 1338, J.S. B-1

to B-29 (9th Cir. 1980), and from the evidence consistent with those findings. Appellants state as facts many of their contentions rejected by the courts below.[1] Because they have failed to raise any "very obvious and exceptional showing of error," however, this Court should not depart from its steadfast refusal to review such factual findings. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949).

B. Historical Background

The Seattle, Tacoma, and Pasco public school districts have determined that racial desegregation is an important educational goal. The overall education of students in a school system suffers when schools are segregated, and the adverse effects fall most heavily upon minority students. The greater the racial imbalance, the greater the impairment. 473 F. Supp. at 1001 and 1011, J.S. at A-7 and A-25 (Findings of Fact Nos. 3.1 and 3.1(a) (hereinafter, *e.g.*, "FF 3.1")). Since the early 1960's, these public school districts have taken steps to reduce school segregation. *Id.* at 1002-03 and 1005-07, J.S. at A-8 to A-10 and A-14 to A-18 (FF 3.8, 4.3, 5.1, 6.1, and 6.12). Tacoma and Pasco have assigned students to other than their "neighborhood" schools for many years. *Id.* at 1002-04, J.S. at A-9 to A-13 (FF 4.3, 4.4, 5.1, and 5.14).

Because the antibusing statute in question arose mainly in opposition to effective desegregation in Seattle, events there must be recited in some detail. Segregated housing patterns in Seattle result in segregated schools under even a noninvidious neighborhood school assignment policy. *Id.* at 1007, J.S. at A-18 (FF 6.14). During the 1960's and 1970's, the minority residential areas expanded, and racial imbalance in the schools increased. *Id.* at 1006, J.S. at A-17 (FF 6.8); J.A. 75-83 and 144-50; Def. Ex. A-97.

---

[1] Contrary to its present contentions, the United States informed the courts below that the District Court's findings accurately reflected the facts.

In 1971, after eight years of limited success with voluntary desegregation transfers, the locally elected Seattle School Board adopted a mandatory middle school desegregation program as a back-up to continued voluntary efforts. Litigation delayed implementation of that program until fall 1972.[2] The program also prompted a nearly successful effort to recall four board members. *Id.* at 1002 and 1006, J.S. at A-8 and A-16 (FF 3.10 and 6.3).

Until the 1978-79 school year, Seattle employed no additional mandatory desegregation strategies, and school segregation increased, except in the middle schools. During 1976-77, the District planned and publicized a voluntary "magnet" school desegregation program, which was carried out in 1977-78. It successfully attracted some new student movement, but much of that movement was not desegregative. *Id.* at 1006, J.S. at A-16 to A-17 (FF 6.5, 6.6, and 6.8); J.A. 111.

In early 1977 several organizations, including intervenor-plaintiffs American Civil Liberties Union, National Association for the Advancement of Colored People, and Church Council of Greater Seattle threatened legal action to force Seattle to desegregate. In April 1977 the NAACP filed a complaint with the Office for Civil Rights (OCR) of the Department of Health, Education and Welfare, charging the District with violating Title VI, 42 U.S.C. § 2000d (1976), by maintaining purposefully segregated schools. 473 F. Supp. at 1005-06, J.S. at A-15 (FF 6.1). OCR scheduled an investigation.

In May 1977 the Mayor of Seattle and the presidents of the local Chamber of Commerce, Municipal League, and Urban League urged the Seattle School Board to adopt a definition of racial isolation and a commitment to its elimination by a time certain. J.A. 139-40. This broad support for locally controlled desegregation was consistent with the

[2] *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972).

Board's belief as to its educational, moral, and legal duty,[3] and was an important factor in the Board's June 1977 adoption of a resolution defining segregation (*i.e.*, "racial imbalance"[4]) and directing its elimination by autumn 1979 through use of educationally sound strategies. J.A. 49-50. The Board further directed a six-month public planning process. 473 F. Supp. at 1006, J.S. at A-17 (FF 6.9); J.A. 136-38. In July 1977 the Board established equity of movement (*i.e.*, roughly equal numbers of minority and majority students mandatorily assigned to non-neighborhood schools) as an essential feature of acceptable plans. J.A. 127.

C. The Seattle Plan

On December 14, 1977, after a lengthy public process, including analysis of five model plans[5] by a citizens'

[3] The Board was well aware that there was some likelihood a court could find unlawful segregation in Seattle. J.A. 12-13, 16-17, 74, & 127. Although unable and unwilling to examine the motives of its predecessors, the Board was not unreasonable in its perceptions. Faculty assignment practices, for instance, had been similar to those which numerous court decisions have deemed to further schools' racial identifiability. Pl. Ex. 69. Other historical factors, such as drawing of attendance boundaries and student transfer policies, in some instances bore at least surface similarity to the facts reported in *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman (II)*, 443 U.S. 526 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); and similar decisions.

[4] The Seattle Plan's goal to reduce racial imbalance is in no sense a "racial balance plan" directed at achieving the goal of "complete racial balance." Brief for United States at 5. No particular range or ratio of minority to majority students is required. The percentage of minority students in any school may range from zero, *i.e.*, no minority students, to 20% above the districtwide minority percentage, provided that no single minority group is more than 50% of a school's student body. J.A. 50. This is a less demanding desegregation goal than has been directed by numerous court orders reviewed by this Court. *E.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 6-10 (1971). *See also McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The Washington State Board of Education and Washington State Human Rights Commission have adopted the same definition of "racial isolation" and have stated it to be public policy to eliminate such "racial isolation" by whatever means necessary. 473 F. Supp. at 1002, J.S. at A-8 (FF 3.11); J.A. 65-69.

[5] Each of the plans relied heavily on mandatory student assignments, either as an initial strategy or as a backup to voluntary strategies. As Board member Cheryl Bleakney testified, the public, while preferring voluntary plans if possible (as did the Board), repeatedly expressed the desire for stability and predictability in student assignment patterns. J.A. 126-31.

committee and over 30 public hearings, the Board by a vote of six to one adopted the Seattle Plan for school desegregation. 473 F. Supp. at 1007, J.S. at A-17; J.A. 141-44. The Plan, which contains elements of several of the model plans, desegregates elementary schools by "pairing" and "triading" minority with majority elementary school attendance areas. Thus, the Plan assigns individual students not on the basis of their race (as in some mandatory and most voluntary plans), but together with all other students in their attendance area. Secondary schools are desegregated by restructured feeder patterns from elementary, to middle, to high schools.

Students thus remain, if they choose, with other students from their immediate neighborhoods in established patterns from grade school through high school. Any inconvenience is equitably distributed, with roughly equal numbers of minority and majority students mandatorily reassigned. Students subject to mandatory assignments spend roughly half of their school years near their homes.[6]

Although the mandatory aspects of the Plan were necessitated by the failure of 15 years of mostly voluntary efforts, the Plan retains as much opportunity for voluntary transfers as in a "voluntary-first" program. 473 F. Supp. at 1007, J.S. at A-17 to A-18 (FF 6.11). Because "voluntary-first" strategies have inherently unpredictable results at the individual student and individual school levels, primary reliance upon them would have required constant readjustments and last-minute resort to virtually random mandatory assignments made purely on the basis of individual students' race, as the Board learned from its experience with the middle schools program. J.A. 88. It is wasteful and self-defeating to make mandatory "backup" assignments of students to programs which have been

[6] The length of bus rides under the Seattle Plan was kept to a minimum. The average "mandatory" bus ride in Seattle is 35 minutes, with 45 minutes maximum. The average "voluntary" bus ride is 40 minutes, with 60 minutes maximum. Roughly half of all students in Seattle take buses to school. Somewhat over half of those students do so as part of the Seattle Plan, with fewer than half of those moving mandatorily.

uniquely designed to attract students with special interests or talents. The "mandatory-first" plan based on pairs and triads permits predictability and stability over time, and has important educational and practical advantages, without sacrificing voluntary opportunities. J.A. 130.

Voluntary programs and transportation are considerably more expensive than mandatory. With the mandatory assignment patterns of the Seattle Plan, a bus can fill up with children at a few central stops in a neighborhood and can take them all directly to the same destination; voluntary student movement is widely scattered and transportation correspondingly far less efficient. J.A. 72. Magnet programs rely on expensive staff, programs, supplies, equipment, publicity, and annual recruiting efforts to attract students. State statutes limit the funds that may be raised by special local property tax levies to spend on such programs. Further, even assuming whites would volunteer in substantially increased numbers, Seattle's minority-area schools lack capacity to absorb enough white students to desegregate, especially since even greater numbers of minority volunteers "out" could not be expected while programs were being enhanced to attract whites. J.A. 120-31.

As the undisputed testimony of black Seattle School Board member Dorothy Hollingsworth and black community leaders established, J.A. 93-96, 191-93, and 196-98; Tr. 218-25, the Board's adoption of the Seattle Plan was the realization, through the local political process, of important minority educational and political goals. Because a voluntary-only plan under Initiative 350 would destroy the Seattle Plan's equity of movement, minority volunteers would significantly decline from previous levels in reaction to the white community's repudiation of desegregation. 473 F. Supp. at 1007, J.S. at A-18 (FF 6.16); J.A. 94-95, 191-93, and 196-98; Tr. 218-25 and 445-55.[7]

[7] This would cripple voluntary desegregation strategies, which rely for their limited success upon a disproportionately high level of minority student transfers. 473 F. Supp. at 1006 & 1010, J.S. A-17 & A-24 to A-25 (FF 6.7, 8.5, 9.1, 10.1, & 11.1).

D. Origin and Passage of Initiative 350

A group of citizens unsuccessfully sought to enjoin adoption of the Seattle Plan, organized Citizens for Voluntary Integration Committee (CiVIC), and then sought to enjoin implementation of the Plan. 473 F. Supp. at 1007, J.S. at A-18 to A-19 (FF 7.1-7.3).

CiVIC also drafted Initiative Measure No. 350 in direct and sole reaction to the Seattle Plan's "forced busing."[8] *Id.* at 1001 and 1008, J.S. at A-6 and A-19 (FF 1.28, 7.4, and 7.9); *see* 633 F.2d at 1343 and n.2, J.S. at B-4. In composing the antibusing initiative, the drafters wrote to all Washington school districts for advice on providing maximum flexibility for "normal" operations, and then satisfied all expressed concerns. 473 F. Supp. at 1008, J.S. at A-19 (FF 7.8); Def. Ex. A-102; J.A. 102-04.[9] The drafters specifically prohibited all the mandatory desegregation strategies of the Seattle Plan and all known mandatory

---

[8] The president of CiVIC testified as follows:

> Q Isn't it then an accurate statement to say that Initiative 350 was designed specifically to stop the ... mandatory aspect of the Seattle Plan or any other mandatory plan such as Seattle or other school districts might adopt?
>
> A That's extremely accurate.

J.A. 168.

[9] As to transportation of students for all reasons except desegregation, the legislative co-chair of CiVIC testified: "[W]e tried to cover those in our exceptions." J.A. 189. This CiVIC leader's testimony is instructive, especially since it was taken in one of the earlier lawsuits, soon after the initiative was developed, and long before this litigation alerted the initiative's proponents to the danger of acknowledging that the initiative's only target was mandatory desegregation: "It was our goal to make this initiative as flexible as possible not to interfere with the development of any program in any school district except where they might use mandatory busing." J.A. 188-89.

alternatives. 473 F. Supp. at 1010, J.A. at A-24 (FF 8.3-8.6).[10] The State agrees that "opponents of the plan . . . drafted, filed, solicited signatures for and campaigned for passage of Initiative Measure No. 350 . . . ." Brief of Appellants at 4.

The terms "busing," "forced busing," and "mandatory busing" in connection with Initiative 350 were synonomous with busing for desegregation. 473 F. Supp. at 1009, J.S. at A-21 to A-22 (FF 7.22); Tr. 77-78, 265-66, 349-51, 662, and 715; Pl. Ex. 2, Tr. 22. There is a conscious or subconscious racial factor in at least some opposition to "forced busing."[11] CiVIC's campaign to secure the signatures necessary to place the initiative on the ballot assured that it would affect only "forced busing" and not "traditional" student assignment policies of local districts. 473 F. Supp. at 1008, J.S. at A-21 (FF 7.18). That campaign made clear that the purpose of Initiative 350 was to stop Seattle's mandatory desegregation efforts. *Id.* at 1007-09, J.S. at A-19 to A-23 (FF 7.5, 7.14, 7.19, and 7.23); Pl. Exs. 38-44 and 51-67.[12]

---

[10] The president of CiVIC testified as follows:

> Q Isn't it true that [§ 3 of Initiative 350] was devised specifically in response to the Seattle Plan in an effort to enumerate those characteristics of the Seattle Plan which could not be utilized as an indirect method of getting around the prohibitions of Initiative 350?
>
> A I'd have to answer yes.

J.A. 168-69. The CiVIC co-chair, *see* note 9, *supra*, testified that the prohibitions of § 3 were enumerated because

> school districts who are committed to using mandatory bussing to achieve racial integration might very well use another reason for—at least state another reason, you see, for implementing that plan. They might for instance, say that the pairing of schools offered a better education when indeed their goal was really integration if the initiative was directed strictly to a racial integration of schools.
>
> . . . .
>
> If the initiative had been directed to its correcting racial imbalance, if the initiative had said they may not use bussing beyond the nearest or next nearest school to the purpose of correcting racial imbalance, then a school district whose—whose goal might be the integration of the schools could still adopt a pairing plan and say, well, this plan isn't really for integration, it is just to achieve better education. I consider that a not very remote possibility.

J.A. 188-89.

[11] J.A. 91-93, 100-04, & 154-67.

[12] For example, advertisements in major newspapers around the state began: "Initiative 350 was drafted in response to a desegregation plan enacted by the Seattle school board." Pl. Ex. 38, p. 49, Tr. 486.

In July 1978 the election campaign began. CiVIC's spokespersons continued to maintain that the initiative would affect only "forced busing" for school desegregation, and repeatedly stated that 99 percent of the State's 300 school districts would not be affected by the initiative. 473 F. Supp. at 1008-09, J.S. at A-21 (FF 7.18-7.20). The three the initiative would affect are plaintiffs in this action. *Id.* (FF 7.19).

A voters' pamphlet was mailed to all of the State's registered voters. The arguments for Initiative 350 by CiVIC focused on "forced busing." Pl. Ex. 2, Tr. 22. The arguments against the initiative warned that the initiative would return the Seattle, Tacoma, and Pasco public schools to segregation, and made clear that the initiative arose in reaction to Seattle's desegregation program. 473 F. Supp. at 1008, J.S. at A-20 to A-21 (FF 7.13 and 7.14). Both positions recognized that the initiative had one direct and immediate objective: halting desegregative non-neighborhood assignments in Seattle.

The electorate passed Initiative 350 at the November 7, 1978, general election. In Seattle's predominantly minority 37th Legislative District, the initiative failed. *Id.* at 1009, J.S. at A-22 (FF 7.24 and 7.25).[13]

Initiative 350 permits local school districts to assign students to other than their nearest or next-nearest schools for all common reasons except desegregation. *Id.* at 1010 and 1013, J.S. at A-24 to A-25 and A-29 to A-30 (FF 8.3 and 8.8 and opinion).[14] It permits a local community to obtain a desegregated educational experience for its students *only* if a court orders the school district to do so. *Id.* at 1011, J.S. at A-25 (FF 8.9 and 8.10). The initiative would end the

[13] The initiative also failed in the predominantly white 43rd District, which is generally that area of Seattle joined since 1972 with the 37th District in the mandatory middle school desegregation program.

[14] Defendant State Superintendent of Public Instruction testified he was unaware of any "forced busing," other than for desegregation, not encompassed within the exceptions of the initiative. J.A. 96-97.

desegregation programs in Pasco, Tacoma, and Seattle and prevent Seattle from eliminating racial imbalance. *Id.* at 1010, J.S. at A-24 to A-25 (FF 8.5, 9.1, 10.1, 11.1, and 11.2).

E. The Initiative 350 Lawsuit

Prior to Initiative 350's effective date, the Seattle, Pasco, and Tacoma School Districts, board members from those districts, and several individuals as guardians of their student children (the "school district plaintiffs") brought suit charging that Initiative 350 discriminated on the basis of race in violation of state law, the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964, and that the State and the United States had caused purposeful segregation that was reflected in Seattle's schools. R. 1.

A number of parties intervened in the action. The local intervenor-plaintiffs contended additionally that Seattle was guilty of purposeful segregation and that if, as a result of Initiative 350 or otherwise, the District did not voluntarily desegregate, the court should order it to do so. The claims that the State and the United States had caused unlawful school segregation and that Seattle had not adhered to a noninvidious school assignment policy in the past were bifurcated for trial, if necessary, as Phase II of the litigation. The United States intervened as a plaintiff under 42 U.S.C. § 2000h-2 (1976). CiVIC and several individuals intervened as defendants.

F. The District Court's Decision

After nine days of trial, producing over 2000 pages of transcript and over 250 exhibits, the District Court determined that it was

> compelled to find Initiative 350 unconstitutional upon several grounds: (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a

> school board may be under a constitutional duty to do so even in the absence of a court order.

473 F. Supp. at 1012, J.S. at A-27.

As to the first ground, the District Court relied primarily upon *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Nyquist v. Lee*, 402 U.S. 935 (1971), *aff'g mem.* 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court). The only difference from those cases was purely superficial. There, the laws expressly prohibited or burdened efforts to remedy or protect against discrimination; Initiative 350 prohibited for all purposes the use of a technique necessary to remedy segregation, but then created exceptions for every significant purpose other than desegregation. "This is as effective a racial classification as is a statute which expressly forbids the assignment of students for racial balancing purposes." 473 F. Supp. at 1013, J.S. at A-30.

Under its second rationale, the District Court found that it could not precisely ascertain the subjective intent of each person who voted in support of Initiative 350, and that a judgment could not be based upon what might be " 'safely assume[d]' as to the subjective intent of the voters." *Id.* at 1014, J.S. at A-31. Consequently, the court relied primarily upon circumstantial indicia of purpose. The court found that Initiative 350 would result in a substantial increase in public school segregation, that such an increase would damage the education of minority children, and that this impact was both a "certainty" and a contemplated result of the initiative. *Id.* at 1015, J.S. at A-33 to A-34. Moreover, the background and context of the initiative made it clear that one significant purpose of Initiative 350 was terminating effective desegregation. The initiative forbids "every major effective technique" of desegregation. Further, it was a "marked departure from the . . . norm" for "an administrative decision of a subordinate local unit of government" to be "overridden in a statewide initiative by voters, a great number of whom were entirely unaffected by" the decision. *Id.* at 1016, J.S. at A-35. That departure was even more telling in light of the

traditional local autonomy of school boards with respect to the assignment of students. *Id.*

Third, the District Court held that Initiative 350 improperly applies on its face to a school district under an affirmative constitutional duty to desegregate, leaving as its only recourse "litigation in order to have a court declare the course of action that it should take." *Id.* at 1016, J.S. at A-36.

The school district plaintiffs incurred substantial attorney's fees and costs in the litigation—funds which would otherwise have been available for educational purposes. Nonetheless, the District Court refused to award attorney's fees to the school district plaintiffs on the grounds that the public had already paid the fees. J.S. at C-2.

G. The Court of Appeals' Decision

Despite successful implementation of the Seattle Plan, the State sought review in the Court of Appeals for the Ninth Circuit. The State did not specifically dispute any of the underlying facts found by the District Court. With one judge dissenting, the Court of Appeals affirmed the conclusion that Initiative 350 is unconstitutional, but reversed the District Court's denial of the school district plaintiffs' motion for attorney's fees.

As to the constitutional issues, the Court of Appeals found it necessary to discuss only the District Court's conclusion that Initiative 350 embodies an invidious racial classification, agreeing with the District Court that Initiative 350 was materially indistinguishable from the statute overturned by this Court in *Lee*. 633 F.2d at 1342-43, J.S. at B-4 to B-5.

In short, "Initiative 350 embodies a constitutionally-suspect classification based on racial criteria because it legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason." *Id.* at 1343-44, J.S. at B-5. If it

were to make a difference that the classification was covertly rather than overtly embodied in the initiative, "[l]awmakers who seek to establish impermissible racial classifications will in the future be able to achieve, by artfully worded statutes like Initiative 350, constitutionally forbidden goals." *Id.* at 1344 and n.4, J.S. at B-6 to B-7.

As to attorney's fees, the Court of Appeals held that nothing in the plain language or legislative history of the relevant statutes foreclosed or limited awards to publicly funded plaintiffs. *Id.* at 1348, J.S. at B-14 to B-15. On the contrary, such awards would further the congressional purposes of encouraging vindication of constitutional rights and stimulating voluntary compliance with the law. *Id.*

The Court of Appeals denied rehearing and rehearing *en banc*, J.S. at E-1, and this Court subsequently noted probable jurisdiction.

Now in its fourth year, the Seattle Plan has not only successfully desegregated the public schools, but has done so with significant community support and without violence or racial tension.[15] As the Court of Appeals noted, "the 'Seattle Plan' in particular has been hailed as a model for other large cities." 633 F.2d at 1341, J.S. at B-1.

---

[15] The Seattle Plan achieved its goal of elimination of racial imbalance in 1979 and has maintained desegregated schools since. Desegregated education has become institutionalized in Seattle. After extensive citizen involvement, the School Board in February 1981 adopted a three-year plan to maintain stable desegregated schools, again citing its "legal and educational duty." For a current account of desegregation in Seattle, see *Proposed Bills on Court Ordered School Busing—Hearings on S. 528, S. 1147, S. 1647, & S. 1743 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) (October 16, 1981, statement of Suzanne Hittman, Seattle School Board President). For an historical account of development of the Seattle Plan, see A. Sieveland, *Without a Court Order—The Desegregation of Seattle's Schools* (1981).

SUMMARY OF ARGUMENT

The District Court correctly recognized three ways in which Initiative 350 violates the Fourteenth Amendment.[16] If this Court finds support for any one of the bases of unconstitutionality, as did the Court of Appeals, the judgment must be affirmed.

First, Initiative 350 directly embodies an invidious racial classification admittedly unsupported by any compelling state interest. Designed to treat student assignments for desegregation differently from all other student assignment matters, it operates to maintain and increase segregation, to inhibit equal educational opportunity, and to deny

---

(cont.)

Contrary to the "conventional wisdom" that mandatory busing for desegregation causes substantial "white flight" and is therefore counterproductive, white student attrition in Seattle has been roughly the same in the four years of the Seattle Plan's operation as it was in the three years preceding the Plan. The white loss from predominantly minority and transition areas, which is "certain" with a neighborhood assignment policy, has been reduced. *See* 473 F. Supp. at 1010-11, J.S. at A-25 (FF 11.3). Test scores in Seattle have slightly improved; significant improvements are expected in the longer term, consistent with the national research. Moreover, even apart from test scores, a diverse student body better prepares students for life in a pluralistic society. Thus, the experience in Seattle is consistent with that nationwide, as shown by the State's own Ex. A-133, Tr. 1346 (Harris Poll) at pp. ix, x, and 40:

> While there are whites who are still emotionally disturbed at the notion of busing for racial balance, the almost automatic claim that "busing is a disaster" simply does not hold up in the face of the facts from this study. . . . The irony of busing to achieve racial balance is that rarely has there been a case where so many have been opposed to an idea, which appears not to work badly at all when put into practice. . . . Among whites whose children have been bused for desegregation, 78% say the experience is satisfactory or highly satisfactory.

[16] Whether Initiative 350 violates the State Constitution was expressly left unaddressed by the District Court, 473 F. Supp. at 1016, J.S. at A-36. If the District Court and Court of Appeals were incorrect as to federal law, the case should be remanded for application of state law and, if necessary, for Phase II of the litigation. *See Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 (1977).

minority interests. School operations in Washington have traditionally been local matters, and only after adoption of the Seattle Plan for desegregation did the voters of the State as a whole feel the necessity to dictate student assignment policy in one narrow area to three local districts. In so doing, Initiative 350 restructures the political process in a non-neutral manner by foreclosing to minorities the traditional mechanism of influencing one's local school board as a means of attaining educational goals.

Second, the District Court's finding that Initiative 350 purposefully discriminates against racial minorities is compelled by the evidence. Prior to the election, it was well known to the electorate that the initiative would end the Seattle Plan and dramatically increase school segregation, and that voluntary desegregation efforts had failed and would fail again. The context and purpose of Initiative 350 was opposition to the Seattle Plan and effective school desegregation. Discriminatory purpose was also reflected in the procedural departure from the norm represented by the first use of the statewide initiative process to deal with a traditionally local school district matter in one area, racial desegregation, and—by careful design—only in that area. Further, the absence of a close relationship between the antibusing initiative and any permissible purpose, as well as evidence of subjective intent, both reflected discriminatory purpose.

Third, Initiative 350 unconstitutionally interferes with the affirmative duty of school districts to remedy past unlawful segregation. It prohibits local school districts from assigning students beyond their neighborhood schools, except pursuant to court order, without regard to whether those local school districts have or perceive a constitutional duty to desegregate. Because the statute on its face is susceptible of application to constitutionally *required* conduct, it is invalid.

Finally, the Court of Appeals correctly held that the successful school district plaintiffs are entitled to their costs

and attorney's fees. Federal law requires such an award unless special circumstances render it unjust. No such circumstances exist here. Indeed, a denial of costs and fees would mean that school board members must choose between surrendering the constitutional rights of their students, which they are sworn to uphold, or irreparably diverting necessary funds from education.

ARGUMENT

A. Initiative 350 Embodies a Racial Classification Disadvantaging Minorities

The Court of Appeals and the District Court properly relied upon *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Nyquist v. Lee*, 402 U.S. 935 (1971), *aff'g mem.* 318 F. Supp. 710 (W.D.N.Y. 1970), in concluding that Initiative 350 reflects an invidious racial classification unjustified by any compelling state interest.

1. Hunter *and* Lee

In *Hunter* this Court held that § 137 of the Akron City Charter violated the Fourteenth Amendment. The charter provision, which was added by a referendum, prevented the city council from implementing, without the approval of a majority of voters, any ordinance dealing with racial, religious, or ancestral discrimination in housing. The provision thus created "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.* at 389. The Court pierced the superficial neutrality of the provision: "although the law on its face treats Negro and white, Jew and Gentile in an identical manner, the reality is that the law's impact falls on the minority." *Id.* at 391. Applying the "suspect classification" test to the provision, the Court found that none of Akron's justifications amounted to a compelling state interest.

Justice Harlan's concurrence focused on § 137's restructuring of the political process in a racially

discriminatory manner: "Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395. Such a provision is "discriminatory on its face," and must fall "unless it can be supported by state interests of the most weighty and substantial kind." *Id.* at 393.

In *Lee* a three-judge court held *Hunter* dispositive as to a New York statute prohibiting student assignments and certain other actions "for the purpose of achieving racial equality in attendance." 318 F. Supp. at 712. Like Initiative 350, the New York antibusing statute had the effect of differentiating between racial matters and other problems in the same area. *Hunter*, according to the court in *Lee*, stands for the principle that "the state creates an 'explicit racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id* at 718. Because the lower court's sole stated rationale and any possible alternative theories in *Lee* apply equally to Initiative 350, this Court's summary affirmance is controlling here. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).[17]

---

[17] The United States contends that *Lee* may be explained on two grounds that make it inapplicable here. First, it is said that the statute in *Lee* "clearly prohibited 'all efforts to achieve racial balance' (318 F. Supp. at 715)...." Brief at 25. Second, the statute in *Lee* prohibited race-conscious assignments "pursuant to a court finding of unconstitutional segregation," and thus this Court's affirmance was governed by the decision two weeks earlier in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971). Brief at 25-26 & n.27. Neither distinction is satisfactory.

The statute in *Lee*, like Initiative 350, dealt only with desegregative student assignments and related techniques. 318 F. Supp. at 712. If anything, the prohibitions of Initiative 350 are broader in that § 3 prohibits desegregative school pairing, merging, or clustering; desegregative grade restructuring; and desegregative feeder schools. Neither the New York statute nor Initiative 350 prohibited voluntary desegregation efforts. *See* N.Y. Educ. Law 3201(1) (McKinney 1970). Thus, the *Lee* court's comment that the statute "clearly applies to all efforts to achieve racial balance" must have reflected only the court's earlier conclusion that voluntary plans

2. *Initiative 350's Race-Consciousness*

As the Court of Appeals and the District Court recognized, Initiative 350 is like the charter provision in *Hunter* and the statute in *Lee*. It is race-conscious in its history and race-related in its purpose and effect. The initiative draws a distinction between those groups who seek the law's protection against racial discrimination in student assignments and those who seek to regulate student assignments in the pursuit of other ends. *Compare Hunter*, 393 U.S. at 390.

Initiative 350's drafting and campaign history plainly demonstrates the intention to limit student assignments for desegregation, but not to limit any other assignments, as is suggested by the very name of the proponents—Citizens for Voluntary Integration Committee. In the course of drafting, the exceptions to the "nearest or next-nearest" rule and the desegregation tools specifically prohibited were both expanded. Although more artfully crafted than the statute in *Lee*, the initiative was offered to, and accepted by, the electorate as the most recent step in opposition to "forced busing," *i.e.*, effective desegregation. *Compare* 318 F. Supp. at 716-17.

The law's purpose and effect plainly fall on the minority, by dismantling local school desegregation programs, preventing future adoption of such programs, injuring educational achievement of minority students, and requiring

---

(cont.)

"have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would appear that racial isolation is actually increasing." 318 F. Supp. at 715. That is precisely the situation in this case, and the Justice Department's attempted distinction merely reemphasizes the applicability of *Lee*.

The same is true with respect to the second "distinction." There was no "court finding of unconstitutional segregation" in *Lee*. The statute was struck down in its entirety, not just as applied to districts under court orders to desegregate. Indeed, the district court in *Lee* specifically upheld the personal standing of parents of children in schools suffering only from "*de facto* segregation," which there is "no constitutional duty to undo." *Id.* at 713-14. Thus, if *Lee* was directly controlled by the *Swann* cases, it was by *McDaniel v. Barresi*, 402 U.S. 39 (1971), discussed *infra* at 41-42, which upset state court interference with race-conscious student assignments by a local district *not* acting under a "court finding of unconstitutional segregation."

expensive and time-consuming litigation for the vindication of constitutional rights. In *Hunter*, this Court noted that only minorities need the protection of a fair housing law to halt segregative housing choices by whites. 393 U.S. at 391. Here, as in *Lee*, only minorities need the protection of a desegregation plan to halt segregative school choices by whites.

As in *Hunter*, the initiative specially burdens, indeed forecloses, the attainment of important minority educational and social goals through the local political process. In *Hunter* local voters could still enact fair housing ordinances, but Initiative 350 flatly prohibits local non-neighborhood assignments for desegregation, absent a court order. The requirement that any amendments to Initiative 350 be adopted at the state, rather than the local, level effectively removes from Seattle's minority community any realistic hope of amendment. *See* note 28 *infra*.

The State asserts that there is no unique burden on minorities for three reasons: First, the Seattle Plan reassigns some members of all races, and terminating the Plan necessarily affects them all. Second, many minority parents dislike non-neighborhood assignments. Brief of Appellants at 19-20. Third, the initiative might have some application to assignments unrelated to desegregation. *Id.* at 10.

The first reason is merely the suggestion—repeatedly rejected by this Court—that separate schools, separate seating, antimiscegenation statutes, repeal of antidiscrimination laws, and the like affect both blacks and whites.[18] The correct approach is shown by *Goss v. Board of Education*, 373 U.S. 683 (1963), where the Court

[18] *E.g., Loving v. Virginia*, 388 U.S. 1, 8 (1967) ("The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination . . . ."); *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964) ("all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty"); *Anderson v. Martin*, 375 U.S. 399, 403 (1964) (fact that candidates of all races must designate race on ballot does not remove requirement's "purely racial character and purpose"). The State is apparently unaware that *McLaughlin* overruled *Pace v. Alabama*, 106 U.S. 583 (1883).

unanimously held that "[t]he alleged equality—which we view as only superficial—of enabling each race to transfer from a desegregated to a segregated school does not" remove the action's "purely racial character and purpose." *Id.* at 688.

The second reason is simply irrelevant. Everyone, including the Seattle School Board, would prefer to accomplish school desegregation in some other manner. Yet, the record in this case establishes that mandatory non-neighborhood assignments were essential to effective desegregation, and that minority parents had invoked the local political process and accepted some inconveniences to obtain desegregated education. Even if minority leaders had opposed the Seattle Plan, that would not justify a denial of the interests of other minority children. *See Castaneda v. Partida*, 430 U.S. 482 (1977); *id.* at 503 and n.2 (Marshall, J., concurring).

Third, in the hope of escaping the conclusion that the initiative is a racial classification, the State strains to apply it to nonracial student assignments. These situations, which either do not occur in the real world or else fall within the broad exceptions to the initiative,[19] are nothing more than after-the-fact speculation as to possible, unintended side

[19] For instance, there is no evidence in the record that school districts assign students to other than their nearest or next-nearest school to "balance class size." The Spokane newspaper article (Ex. A-130) cited by the State, Brief at 10 n.6, was successfully objected to as hearsay, and was admitted only for the limited purpose of showing what was before some voters prior to the Initiative 350 vote. Tr. 937. The witness through whom the State wished to make its point testified that the only non-neighborhood busing in Spokane is due to "overcrowding," Tr. 934, which of course is among the initiative's exceptions.

The suggestion that districts would transport students away from neighborhood schools simply to secure transportation reimbursement from the State is likewise unfounded. In recent years the State has reimbursed a substantial portion of, but far from all, local transportation expenses. Because local districts must contribute their own resources to any transportation, it is always a losing proposition financially.

effects of a measure designed to affect only racial matters. Initiative 350 must be construed as repeatedly interpreted by its sponsors.[20] CiVIC consistently denied that the initiative would affect anything but desegregation busing. The State's argument, that a statute which clearly and admittedly was *intended* to deal with race relations can be saved by additional but unanticipated *impacts*, stands *Washington v. Davis*, 426 U.S. 229 (1976), on its head.[21]

3. *Overt v. Covert Classifications*

The only difference between the statute here and that in *Lee* is one of form and not substance. Initiative 350 was more carefully drafted—and purposefully so. Thus, unless clever language excuses the same objective as in *Lee* and *Hunter*, Initiative 350 must be subjected to strict scrutiny.

That *Hunter* and *Lee* apply to artful as well as obvious racial classifications is clear from *Buchanan v. Evans*, 423 U.S. 963, *aff'g mem.* 393 F. Supp. 428 (D. Del. 1975). In that case, a statute directed officials to consider consolidating the state's school districts, with two exceptions, into a smaller number of districts. The district court found the two exceptions—Wilmington and districts with over 12,000 pupils—were intended to preclude desegregative consolidations of other districts with the largely minority Wilmington district. Although consolidating Wilmington with other districts could still be accomplished by referendum, although one other district was inadvertently excluded by the 12,000-student provision, although there was

---

[20] The basic rules of construction applicable to enactments of the legislature also apply to direct legislation by the people. *State ex rel. Public Disclosure Commission v. Rains*, 87 Wash. 2d 626, 633, 555 P.2d 1368, 1373 (1976). Determining the collective intent of the people is the objective, and material in the official voters' pamphlet is relevant. *Department of Revenue v. Hoppe*, 82 Wash. 2d 549, 552, 512 P.2d 1094, 1096 (1973).

[21] Nor is the argument supported by *James v. Valtierra*, 402 U.S. 137 (1971). The referendum at issue in *James* applied not to integrated housing but to low-income housing, and the Court found no evidence that it was in fact an inadvertently broad statute aimed only at race relations in housing. *Id.* at 141. Here the critical fact of race-consciousness is openly admitted.

no finding of an interdistrict constitutional violation, and although the statute was "racially neutral on its face," the district court found that the statute reflected "a suspect racial classification." 393 F. Supp. at 442. This Court affirmed summarily, with three Justices dissenting on other grounds.

Concern with transparently race-conscious statutes did not end with *Evans*:

> This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356; *Guinn v. United States*, 238 U.S. 347; *cf. Lane v. Wilson*, 307 U.S. 268; *Gomillion v. Lightfoot*, 364 U.S. 339.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979). Such a racial classification is presumptively invalid, regardless of any other proof of motivation and regardless whether the classification is "covert or overt." *Id.* at 274. *Feeney* is thus consistent with the Court's duty to strike down "sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).[22]

The courts below correctly concluded that Initiative 350 creates a racial classification. It is not the rare classification, such as those in *Korematsu v. United States*, 323 U.S. 214 (1944), or *Strauder v. West Virginia*, 100 U.S. 303 (1880), that expressly burdens only a racial minority. Nor is it a classification, such as those in *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964); and *Hunter*, that mentions race, and race relations, but does not expressly burden one race more than another.

[22] The "covert or overt" language in *Feeney* is also consistent with the jury discrimination cases. In those cases, no classification is explicit on the face of the law. Substantial underrepresentation in practice, however, is sufficient to shift the burden to the state to rebut the suggestion of discriminatory purpose. *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977); *accord, Washington v. Davis*, 426 U.S. at 241. This case is an even clearer one for shifting the burden since it is admitted that the law in fact deals with racial matters.

Instead, it is a classification, such as those in *Gomillion*, *Yick Wo*, and *Guinn*,[23] all mentioned approvingly in *Feeney*, that only transparently avoids the express mention of race and race relations, but that undeniably deals with both.

4. ***Necessity of Further Proof of Purpose***

Finally, the State asserts that its appeal rests on the proposition that after *Washington v. Davis* "courts are no longer free to *presume* from the face of a given statute—as was done in *Hunter* and *Lee*—that an illicit segregative purpose motivated its passage." Brief of Appellants at 23 (emphasis in original). The assertion that *Davis* overturned *Hunter* and *Lee* is simply wrong. Race-conscious statutes—such as those in *Hunter*, *Lee*, and this case—by their very concern with racial matters create a risk that bias infected the majority's consideration of minority interests, at least where they do not benefit the minority. *Compare Regents of the University of California v. Bakke*, 438 U.S. 265, 357 (1978) (opinion of Brennan, White, Marshall, & Blackmun, J.J.).[24] Only the absence of any alternative means of satisfying a compelling state interest is normally sufficient to dispel that suspicion of antipathy.

Accordingly, *Hunter* was cited approvingly in *Davis*, which went on to state "[t]hat is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute . . . ." 426 U.S. at 241. The Court has since made it clear that, because the statutes in *Hunter* and the present case burden minorities and involve concern with racial matters, they are not the kind of neutral laws with

[23] In *Guinn v. United States*, for example, the Court struck down an Oklahoma constitutional amendment that imposed a literacy test for voting but grandfathered all those who had voted in 1866 and their lineal descendants. Because the 1866 election was the last major election before adoption of the Fifteenth Amendment, the Oklahoma scheme covertly reflected a racial classification. 238 U.S. at 364. Initiative 350 is equally clever, but equally obvious.

[24] Contrary to the *Bakke* situation, where the governmental benefit to the minority is at the expense of the majority, elementary and secondary school desegregation deprives no one of the benefit of an education.

inadvertent impact authorized by *Davis*. As the Court stated in *Feeney*: "Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." 442 U.S. at 272.

If *Davis*, which involved no express or implicit race-consciousness and no allegation by plaintiffs of discriminatory purpose, and *Arlington Heights*, which involved no express race-consciousness and insufficient proof of implicit consideration of race, overturn *Hunter* and *Lee*, then this Court and others must seek out direct evidence of racial prejudice in every case. It has always been enough to invoke strict scrutiny that the majority was dealing, overtly or covertly, with matters that present an inherent risk of antipathy toward minority interests. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979). That risk is sufficient to shift to the State the burden of dispelling the inference of prejudice, usually by establishing "an extraordinary justification" for the action. *See Loving v. Virginia*, 388 U.S. 1, 9-11 (1967); J. Ely, *Democracy and Distrust* 145-48 (1980). Any other rule would place the courts in the unnecessary and unwise position of protecting minority interests *only* by directly accusing other branches of government of racial prejudice.

5. ***Conclusion***

The Court cannot fail to recognize the potential for the corruptive influence of prejudice in a decision whether to allow desegregation. No other proof of invidious purpose is necessary. Instead, the burden should shift to the State to show, for example, that the State interest was sufficiently compelling, and the sacrifice of desegregation sufficiently necessary, to outweigh the potential for corruption. That is a burden the State never even attempted to satisfy. Instead, the initiative contradicts the "compelling" state interest in public school desegregation. *DeFunis v. Odegaard*, 82 Wash.

2d 11, 35, 507 P.2d 1169, 1184 (1973), *vacated as moot*, 416 U.S. 312 (1974).[25]

B. Discriminatory Purpose Was a Factor In Initiative 350's Adoption

Even if the covert but conceded race-consciousness of Initiative 350 were not enough to invoke strict scrutiny, the District Court correctly concluded, under the second prong of *Feeney*, that a discriminatory purpose was at least one factor in the proposal and adoption of the initiative.

In *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court reviewed some of the important indices of whether a governmental action is impermissibly infused with purposeful discrimination:

> (a) "The impact of the official action—whether it 'bears more heavily on one race than another,' *Washington v. Davis, supra*, 426 U.S. at 242—may provide an important starting point."
> (b) "The historical background of the decision," including the "specific sequence of events leading to the challenged decision" and procedural and substantive departures from the norm in connection with the decision, is important circumstantial evidence.
> (c) Finally, the "legislative or administrative history" of the decision may provide direct evidence of purpose and of subjective intent.

Id. at 266-68. Substantial evidence, ignored by the State, supports the District Court's conclusion that Initiative 350 is purposefully segregative under *Arlington Heights*.

1. *Segregative Impact*

The dramatic increase in minority racial isolation that Initiative 350 would have caused was fully foreseen, not just

[25] Initiative 350 makes impossible attainment of public schools' legitimate educational goal of racially diverse student bodies. The institutional interest in diverse student bodies is not only legitimate but is one aspect of academic freedom protected by the First Amendment. *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-15 (1978) (Powell, J.).

easily foreseeable. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65 (1979). Both lower courts concluded that Initiative 350 was directed only at racial desegregation. 473 F. Supp. at 1010, J.S. at A-24 (FF 8.3); 633 F.2d at 1343-44, J.S. at B-5 to B-6. Both courts found it would be impossible to desegregate Seattle's schools without resort to the methods prohibited by the initiative. 473 F. Supp. at 1010, J.S. at A-24 (FF 8.5); 633 F.2d at 1346, J.S. at B-11. Moreover, the inconvenience of desegregation would no longer have been shared equitably. Rather, the limited desegregation obtainable under Initiative 350 would result largely from efforts of minority students. 473 F. Supp. at 1006-07, J.S. at A-16 to A-18 (FF 6.6, 6.7, and 6.16).

Further, the District Court below concluded that the racial isolation under Initiative 350 would disproportionately injure the education of minority students. *Id.* at 1001, 1011, and 1015, J.S. at A-7, A-25, and A-33 (FF 3.1, 3.1(a)); *see* 633 F.2d at 1346-47, J.S. at B-9 to B-13.[26] That same finding as to both purposeful *and* non-purposeful segregation by the district court in *Brown v. Board of Education* was adopted by this Court: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law. . . ." 347 U.S. 483, 494 (1954) (emphasis added); *accord,*

---

[26] The United States now closes its eyes to Initiative 350's effect on the educational benefits to minority students from desegregation, in spite of the District Court's findings. Contrary to the current position of the United States, the District Court did not merely "assume" a detrimental impact on minority student education, but found such an impact as a fact after both sides had presented their evidence. Congress has itself reached the same conclusion. Conf. Rep. No. 798, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2608, 2662-63. The United States cannot wave aside such fact-finding merely by referencing certain extra-record publications, Brief at 38-39 n.39, especially when the publications do not stand for the proposition cited.

Sweatt v. Painter, 339 U.S. 629, 634 (1950).[27] Further, the critical importance of the minority interest in question emphasizes the significance of the evidence of anticipated impact. *Cf. Vlandis v. Kline*, 412 U.S. 441, 459 (1973) (White, J., with Marshall, J., concurring).

2. ***History and Context of the Initiative's Adoption***

The historical background of Initiative 350, the sequence of events leading to its enactment, and the legislative and administrative history of the initiative all make clear that impeding effective desegregation was a purpose, and not just an unfortunate and unintended effect, of the measure. The initiative was conceived solely in response to Seattle's desegregation program, as appellants have conceded and both courts below found. A comparison of the major features of the Seattle Plan with those actions that school officials may not take under § 3 of the initiative quickly confirms the initiative's invidious purpose; a racially neutral neighborhood schools policy is unlikely to be expressed in such desegregation-specific language.

Nonetheless, the State suggests that the courts below believed that a policy of neighborhood schools is per se purposeful discrimination. That innuendo is unfounded. The Court of Appeals specifically stated that a "neighborhood school policy is not constitutionally suspect." 633 F.2d at 1345, J.S. at B-8. In this case, however, both the objective factors and the direct evidence indicate that at least one purpose of statewide opposition to "forced busing" was the racially discriminatory purpose to impede school desegregation.

---

[27] The State's attempt to narrow the legitimate educational concerns of school districts to the results of achievement tests, Brief at 41-42 n.9, lacks support. Preparing children to participate as citizens in a pluralistic democracy entails more than teaching them to read and count. *E.g., Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (schools serve in our society as "an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground"); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 517-18, 585 P.2d 71, 94-95 (1978).

This situation is identical to that hypothesized in *Arlington Heights* as reflecting improper purpose. The Court distinguished the specific sequence of events there—a longstanding low-density zoning designation—from "a far different case," in which the property has previously been zoned to accommodate low-income, multifamily housing, but where the zoning is upgraded to preclude erection of an integrated housing project. 429 U.S. at 267. Such a situation, without any other direct evidence of racial bias, creates a prima facie suspicion of purpose. Here, the longstanding condition was local control of assignments, and not on a strict neighborhood basis, until effective desegregation was proposed.

Further, use of the statewide initiative process by uninvolved voters to deal with a local school district matter was an unprecedented departure from the norm.[28] No prior enacted initiative has dealt with such local school district matters. The argument of the State, Brief at 22, that Initiative 350 merely corrected the one oversight in an

[28] Statewide action prohibiting local decisions benefiting minority groups is particularly troubling because minorities with substantial power in the urban districts are relatively politically powerless in the State as a whole. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 628 (1969); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978).

That is reflected in the fact that a significantly smaller percentage voted for the initiative in Seattle (less than 58%) than in the remainder of the State (over 67%). Def. Ex. A-105, p. 7, Tr. 774.

In elections for two board seats in November 1979, when virtually the only issue which received media attention was desegregation, pro-Seattle Plan candidates defeated anti-Seattle Plan candidates. In one of the races, the incumbent (who had voted to adopt the Seattle Plan) defeated the president of CiVIC. In the November 1981 elections, three of the seven board seats were open. Again, desegregation was an issue, but in each case outspoken opponents of mandatory desegregation were defeated. That efforts to elect antidesegregation candidates and to recall pro-desegregation board members, *see State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972), have been unsuccessful also reflects the ability of minorities to build political coalitions in Seattle.

otherwise perfect scheme of total state control, was not presented to the courts below prior to the Court of Appeals' decision, *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980), and is unsupportable in any event.

In Washington, as in other states, local boards are created by the State and operate within certain broad limitations. In Washington, as in few other states, however, the State is required to fund "basic education," and therefore had to give content to that term. *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978). In practice, nonetheless, local boards still control the operational specifics of "basic education" and independently fund and define "enrichment" programs.[29] The State in some areas sets *minimum* standards, but even those standards generally defer to local practices. That is not substantially different from the national pattern of local school district control, as CiVIC realized and the State Board of Education confirmed. J.A. 70 and 98.[30]

Moreover, in Washington, as in other states, student assignments have always been within the control of local authorities, and remained so after Initiative 350 for all common purposes other than desegregation. Prior to Initiative 350, local districts had the authority under state law to assign students for purposes of desegregation. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972).

---

[29] Currently, only 55% of Seattle School District's funding comes from the State as "basic education" support.

[30] The District Court and the Court of Appeals so concluded, 473 F. Supp. at 1010 & 1016, J.S. at A-23 to A-24 & A-35 (FF 8.20 and opinion); 633 F.2d at 1343 n.2 & 1344, J.S. at B-4 to B-7, and are in a far better position to assess local law and local practice than is this Court. *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975). The similarities between the Washington education system and the national pattern are discussed in greater detail in the brief of *amicus* National School Boards Association.

3. *Lack of Relationship Between Means and Permissible Ends*

Although not discussed in *Arlington Heights*, improper purpose is also objectively reflected in the lack of a close relationship between Initiative 350 and any of its asserted noninvidious objectives. The antibusing initiative, say appellants, was intended to achieve "neighborhood schools," which are desirable because they encourage local involvement in education and reduce student transportation time, risk, and expense. The degree of relationship between those objectives and Initiative 350 is instructive.

First, increasing local control and involvement in schools and decreasing transportation time were far from ignored in the Seattle Plan. The Plan was locally formulated and approved, and it generally keeps neighborhoods together. Although there are bus rides, their length is reasonable, *see* note 6 *supra*, and children spend at least half their years at nearby schools. Thus, the intense statewide interest in Initiative 350 can not be explained by pointing to those noninvidious concerns.

Second, the initiative is not substantially better suited than the Seattle Plan to achieving the purposes said to underlie a neighborhood schools policy. Rather than furthering local involvement and control, Initiative 350 replaces it with a statewide mandate. Indeed, the State and the United States go to great lengths to disclaim local responsibility for schools in Washington.

Furthermore, Initiative 350 leaves untouched school closures—the most drastic removal of the neighborhood school possible—and all common exceptions to neighborhood school assignments other than desegregation. This dramatic underinclusiveness reflects a conclusion by the majority that the minority's interest in desegregated education is qualitatively less important than *any other* common, and basically fiscal, reason for transporting students. Neighborhood schools give way to the desire to save money by closing schools or by avoiding removal of "health or safety

hazards" or "physical barriers," building of new neighborhood schools to eliminate "overcrowding," maintenance or rehabilitation of neighborhood schools to avoid "unsafe conditions or lack of physical facilities," or provision of "special education, care or guidance" within the neighborhoods of handicapped students.

The majority did engage in a "tradeoff" of interests as the United States suggests, Brief at 43, but it was a tradeoff that sacrificed only the minority's interests and not the similarly situated interests of the majority. This Court has repeatedly held that the majority must impose the same burdens on its own interests as on those of the minority if the majority wishes to avoid the suspicion of improper purpose. *E.g., Orr v. Orr*, 440 U.S. 268, 280 n.10 (1979). As Justice Jackson indicated in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949), such a requirement has the prophylactic effect of assuring indirect consideration of minority interests.

Third, voluntary desegregation assignments under the initiative would equally undercut the neighborhood school purposes. The State protests the factual conclusion by the District Court and the Court of Appeals that Initiative 350 would make it "impossible" to desegregate the public schools. Yet, if sufficient voluntary desegregation were to occur under Initiative 350 (a hypothetical that flies in the face of experience and the evidence), just as many students would be bused out of their neighborhoods as in the absence of Initiative 350. Of course, those would be minority students, disproportionately forced to sacrifice the benefits of neighborhood schools to gain the benefits of desegregated schools.

Moreover, the cost and risk of transportation in a hypothetically effective voluntary program would be greater than under mandatory desegregation.[31] Student camaraderie

[31] Because riding a bus to school is statistically safer than walking, *see* U.S. Commission on Civil Rights, *Public Knowledge and Busing Opposition* 17 (1973), the safety justification for opposition to busing has little force.

and parental cohesiveness and involvement would be less than under mandatory desegregation, where groups of students and parents are kept together over the years, and where the composition of the student body is predictable from year to year. Consequently, Initiative 350 achieves a limited measure of the purposes of a neighborhood schools policy only if one assumes that there would be an appreciable decline in actual desegregation.

In sum, Initiative 350's weak or non-existent relationship to constitutionally acceptable goals must be seen to reflect not just the purpose of mandating that children go to neighborhood schools, but also the purpose of hindering effective desegregation efforts that equitably burden all races, as is confirmed by the evidence of subjective motivation.

4. ***Subjective Motivation***

The State's only real challenge to the District Court's sifting and weighing of the evidence of purpose is to suggest that the court "categorically refused even to consider the Defendants' evidence of benign intent on the part of the voting public . . . ." Brief of Appellants at 31. The State's insinuation is both irrelevant and misleading.

Because discriminatory purpose will seldom be nakedly declared, the trustworthiness of the denials of subjective intent submitted by the State is slight, as this Court has repeatedly indicated. *E.g., United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810). *See generally* Ely, *Legislative And Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1218 (1970). As the Court stated in *Feeney*, "[p]roof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights* . . . . What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the

results they avoid." 442 U.S. at 279 n.24.[32] That is especially the case where the decision-maker is not just a multi-membered body but an electorate numbering in the hundreds of thousands.

Nonetheless, although the District Court properly relied primarily upon "objective factors," it explicitly denied the school districts' motion in limine to exclude evidence of the subjective intent of the electorate. R. 429. Resultantly, the record is replete with such evidence.[33] The District Court made specific findings of fact relating to subjective motivation, *e.g.*, 473 F. Supp. at 1001, J.S. at A-8 (FF 3.7), and the court emphasized that its decision was rendered only "[a]fter considering all of the evidence . . . ." *Id.* at 1012, J.S. at A-27.

---

[32] *See also Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (Harlan, J.) ("Judicial inquiry into Congressional motive is at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."); *Arlington Heights*, 429 U.S. at 270 n.20 (upholding exclusion of evidence of subjective motivation).

One reason evidence of subjective intent is untrustworthy is that prejudice is often, if not usually, subconscious. G. Allport, *The Nature of Prejudice* 11 (1954) ("Since they merely follow the folkways they deny that they are prejudiced"). Thus, stated intent might merely be a rationalization for subconscious unease about having one's child attend a desegregated school, as expert witnesses in this case testified. *See* note 33 *infra*. This Court has recognized that it makes no difference whether discrimination is "accomplished ingeniously or ingenuously . . . ." *Smith v. Texas*, 311 U.S. 128, 132 (1940). *See generally* Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7-8, & 14 (1976).

[33] Dr. David Armor, defendants' expert witness, testified that many white parents oppose minority children being bused into a white school. J.A. 104-05. Dr. James Morishima, an expert witness on surveys of racial attitudes, testified that racial bias is a factor in whites' opposition to busing. J.A. 104. Dr. Christine Rossell testified following her review of relevant data that many of the expressed nonracial reasons for opposition to desegregation busing are in fact conscious or subconscious rationalizations of racial fears. J.A. 91-93. A CiVIC attorney acknowledged the existence of racial discrimination as a factor in opposition to busing. J.A. 103-04. Even the CiVIC legislative co-chair testified that there are people in Seattle who are afraid of the other race and do not want their children to be in school with other races. J.A. 102. Sixteen percent of all whites openly favor separation of the races; 27% would be disturbed at having a black neighbor. Def. Ex. A-133, p. vi, Tr. 1346; J.A. 154-67.

5. *Conclusion*

The State contends that Initiative 350 must prevail unless evidence of subjective motivation established that it would not have been enacted "but for" segregative intent. Brief at 27. As this Court has held, however, the objective evidence of discriminatory purpose alone shifted the burden to the State to prove that the initiative would have been proposed and enacted even in the absence of a purpose to impede effective desegregation. *Arlington Heights*, 429 U.S. at 270-71 n.21. That burden is necessary because, where discriminatory purpose might well have motivated legislation, judicial deference is "no longer justified" and close scrutiny is essential. *Id.* at 265-66. In that case, which is this case, the presence of nondiscriminatory purposes among some supporters is irrelevant, unless such purposes constitute compelling state interests that could not be otherwise satisfied. Here they do not, and the courts below properly, albeit reluctantly, intercepted the possibility of majoritarian abuse.[34]

C. Initiative 350 Deters Satisfaction of the Affirmative Duty to Remedy Past Segregation

The District Court correctly recognized that Initiative 350 prohibits *all* non-neighborhood desegregation assignments, except pursuant to court order, regardless of whether a Washington school district has a constitutional duty to desegregate. Under Initiative 350, only a court may eliminate

(cont.)

The testimony of the State's expert, Don Morgan, that the results of certain polls "do not reflect a racial bias on the part of the respondents," was thoroughly refuted. The subject polls do not permit a conclusion one way or the other with respect to racial bias, as they were designed neither to ascertain the existence of such a factor nor to control for the fact that people seldom admit to racial bias, even where they are conscious of being biased. J.A. 154-67; *see* note 32 *supra*. Little if any credence was due the defense expert's conclusion after lengthy cross-examination and rebuttal testimony. *See* Tr. 856-918 & 943-72 (testimony of Don Morgan); Tr. 1288-1345 & 1435-42 (testimony of Dr. James Morishima, plaintiffs' expert); Tr. 1351-71 (testimony of Dr. Douglas L. MacLachlan, plaintiffs' expert); Pl. Ex. 128 (statement of Dr. Morishima).

[34] That a statute with certain similarities in language to Initiative 350 might be upheld in the absence of similar proof of segregative purpose and effect, as was the case with the federal statute upheld in *Brown v. Califano*, 627 F.2d 1221, 1230-31 & n.57 (D.C. Cir. 1980), is irrelevant to a decision in this case. *See also* note 35 *infra*.

the core, as well as the vestiges, of past purposeful segregation, thus vitiating the "affirmative" nature of the local districts' constitutional duty. Moreover, the initiative similarly impedes the federal statutory duty and goal to eliminate non-purposeful segregation.

1. ***The Affirmative Constitutional Duty***

It is by now well established that *local school districts* have an affirmative constitutional duty promptly "to eradicate the effects" of past unlawful segregation.[35] *Dayton Board of Education v. Brinkman (II)*, 443 U.S. 526, 537 (1979). "[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Id.* at 538. Thus, the district is under "the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." *Id.* (relying upon *Wright v. Council of Emporia*, 407 U.S. 451 (1972), and *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972)[36]). Specifically included within the affirmative duty is a responsibility "to see that pupil assignment policies" "are not used and do not serve to perpetuate or re-establish the dual school system." *Columbus Board of Education v. Penick*, 443 U.S. 449, 460 (1979).

---

[35] The duty applies to local districts, not to federal agencies or courts. This analysis is therefore inapplicable to federal laws affecting only federal instrumentalities. *See* note 34 *supra*. Moreover, the facial overbreadth analysis, *infra* at 41-42, is doubly inapplicable to federal laws affecting federal courts, since federal courts could hardly be deterred by a facially overbroad law, and in fact have not been. *E.g., Morgan v. Kerrigan*, 530 F. 2d 401, 412-13 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). Thus, it is irrelevant that this analysis has not been applied to the various federal statutes discussed by appellants. Whether those statutes are or are not constitutional is neither directly nor effectively at issue here.

[36] *Scotland Neck* is instructive in that no court had found the district guilty of unlawful segregation. After the district agreed to desegregate, the state legislature passed a bill creating a new district. 407 U.S. at 486-87. This Court struck down the legislation as likely to "impede the dismantling" of the dual system. Thus, *Scotland Neck* stands directly for the proposition that, whatever a state's authority under state law, it may do nothing to interfere with a local district's determination and satisfaction of its own constitutional duty. *Dayton I*, 433 U.S. 406 (1977), is in no way inconsistent, because in *Dayton I* the district had reconsidered its own decision prior to implementation.

The imposition of this duty on local districts recognizes not just their responsibility but also the vital national tradition in local autonomy of school districts, *Milliken v. Bradley (I)*, 418 U.S. 717, 741-42 (1974), and the fact that local authorities are in the best position for "elucidating, assessing and solving these problems." *Brown v. Board of Education (II)*, 349 U.S. 294, 299 (1955).

2. ***Necessity of "Busing"***

The courts below agreed that Seattle could not effectively eliminate segregation with the techniques permitted under Initiative 350. 473 F. Supp. at 1001-02, 1007 and 1010, J.S. A-7, A-8 and A-23 to A-25 (FF 3.5, 3.6, 3.8, 6:14, 8.1, 8.5, 11.1, and 11.2); 633 F.2d at 1346 and n.9, J.S. at B-11.[37] This Court's experience has led it to the same conclusion: "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971); *accord, Swann v. Charlotte-Mecklenburg Board*

---

[37] "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

Contrary to the present suggestion of the United States, CiVIC's "open enrollment" plan would not have been "effective" in obtaining "fully integrated" schools. Brief at 6 & n.9; *see id.* at 25. This support for a "freedom of choice" plan runs contrary to the position the United States took earlier in this case and in over two decades of school desegregation litigation. *E.g.*, Memorandum for the United States as Amicus, *Green v. County School Board*, 391 U.S. 430 (1968). That earlier position was accepted by this Court in *Green*. *Id.* at 440-41.

The evidence at trial established beyond doubt the lower court's finding that desegregation in Seattle would be impossible under the initiative. *See, e.g.*, J.A. 75, 89-91, 106, 123-30, 150-51, 193-96, & 202-03; Tr. 1414-15 ("Any plan consistent with Initiative 350 . . . would create the most segregated student populations . . . that the Seattle Public Schools has ever known, both in the numbers of schools and in the percentage of minority racial imbalance.").

The State asserts that it controls student assignments and all other aspects of education in Washington. In light of that, it is informative that the State has failed to develop and adequately fund an effective voluntary desegregation program for state schools such as Seattle's. Instead, both the State and the United States have *reduced* funding for voluntary programs and the excess cost of voluntary program busing.

of Education, 402 U.S. 1, 28-29 (1971).[38] Consequently, this "state-imposed limitation on a school authority's [student assignment] discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system," and it must therefore fall. *North Carolina State Board*, 402 U.S. at 45.

Initiative 350 does provide that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to public schools." This "recitation of the obvious" Tr. 1171-72, simply recognizes the impossibility of prohibiting courts from ordering non-neighborhood assignment of students where necessary to remedy a constitutional violation; it is, in the drafter's words, "superfluous." Def. Ex. A-102, p.3. Yet, if past segregation must remain unremedied pending court action, then there is no affirmative duty on the part of the local school districts at all. If the affirmative nature of that duty means anything, it means that a *local district* may not, and must not, await a court order to desegregate.[39] It is precisely for that reason that the courts uniformly applaud efforts of local districts to desegregate without a contested court order. *E.g.*, *Armstrong v. Board of School Directors*, 616 F.2d 305, 312-13 (7th Cir. 1980); *United States v. Board of Education*, 88 F.R.D. 679, 681-82 (N.D. Ill. 1980).

---

[38] Despite widespread unhappiness with mandatory busing, and despite the Congressional directive to consider other alternatives first, 20 U.S.C. §§ 1713-14 (1976), no alternative or combination of alternatives has been found sufficiently effective to eliminate the need for a mandatory student assignment component in numerous plans approved by the lower federal courts. Indeed, even decisions involving only the question of liability, and not remedy, are usually viewed by the public, the press, and even the parties as "busing" decisions, because it is well recognized that mandatory student assignments are essential to effective desegregation. *E.g.*, *Dayton II*, *supra*; *Columbus*, *supra*.

[39] California's Proposition 1, the subject of *Crawford v. Board of Education*, No. 81-38, expressly authorizes local school boards to continue or commence integration plans, including student assignments and transportation, regardless whether required to satisfy a court order. Federal law expressly authorizes local districts voluntarily to adopt desegregation plans that include busing. 20 U.S.C. § 1716 (1976).

3. *The "Saving" Construction of Initiative 350*

Implicitly admitting the force of the above argument, the Washington Attorney General seems to posit a construction of Initiative 350 that would allow a school district to act in the absence of a court order if it *correctly* perceives that it is under a duty to act and if it has exhausted all means of desegregation short of non-neighborhood assignments. This admitted attempt to rewrite the initiative to avoid unconstitutionality fails for a number of reasons.

First, this executive amendment is contrary to the initiative's plain language and purpose. Initiative 350 prohibits all non-neighborhood assignments other than those falling within its exceptions. The exception in question applies only to a court's duty to enforce the Constitution, not a local school district's duty to do so, and the State can point to no legislative history supporting its interpretation.[40] The courts below rejected the State's construction, and were

[40] The State purports to find some support, but the testimony cited, Brief at 39 n.8, instead indicates that CiVIC planned to sue to enjoin any school district that did not immediately comply with the initiative—regardless of whether the district perceived a constitutional duty requiring non-neighborhood assignments. In particular, CiVIC planned to sue to enjoin the Seattle Plan, even though the State apparently believes that Seattle had recognized a legal duty to desegregate. Brief at 41. Any construction of the initiative that would preserve the Seattle Plan is hardly consistent with its undisputed purpose to do nothing if not end the Seattle Plan.

Within weeks of the Court of Appeals' decision, House Bill 711 was introduced in the Washington State Legislature to terminate state funding of mandatory desegregation transportation. The bill was similar to Initiative 350 in that the funding termination was indirect, accomplished by reimbursement for transportation to the nearest or next-nearest school, with several exceptions. The Legislature rejected an amendment that would have continued traditional state funding of student transportation where an affirmative constitutional duty to desegregate existed. The refusal of the Legislature to incorporate the Attorney General's interpretation of Initiative 350 into the subsequent statute drafted by the same attorneys litigating this case for the State speaks volumes about that interpretation.

The bill was enacted into law, Ch. 343, 1981 Wash. Laws, but was permanently enjoined in an action filed by most of the same plaintiffs as in the present case. *Seattle School District No. 1. v. Washington*, No. C81-276T (W.D. Wash. Dec. 18, 1981) (findings, conclusions, and opinion). The rejected amendment was one reason for the district court's ruling that the funding version of Initiative 350 was also unconstitutional. *Id.* at 5-6.

in a better position than this Court to determine its validity under state law principles. *See* note 30 *supra*.

Although legislation must be construed where possible to accord with the Constitution, "this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose." *Howard v. Illinois Central R.R.*, 207 U.S. 463, 501 (1908). Accordingly, in *Lee* and *North Carolina State Board* this Court affirmed the district courts' refusal to accept similar "saving" constructions "too tortuous to warrant serious consideration." *Lee*, 318 F. Supp. at 715-16; *accord, North Carolina State Board*, 312 F. Supp. 503, 507 (W.D.N.C. 1970).

Additionally, the intimation that the Washington Attorney General has construed the statute so as to recognize the affirmative constitutional duty is inaccurate. The Attorney General refused to provide an opinion construing the statute, preferring instead to await the outcome of this litigation before determining how broad a formal opinion to give. Def. Ex. A-89, Tr. 589. There is no objective and authoritative opinion of the Attorney General—only litigative posturing.

Even if the purported construction had come through a formal opinion by the Attorney General, state courts would accord it only as much deference as its logic demands.[41] Thus, the State's present interpretation of Initiative 350 could be upset by any interested party, including the State itself.[42]

[41] *E.g., Kasper v. Edmonds*, 69 Wash. 2d 799, 805, 420 P.2d 346, 350 (1966) (Attorney General's opinion will be ignored where contrary to "reason, legislative history, or other rules of statutory construction").

The United States cites *Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962), as somehow standing for the proposition that "[a]bsent a state court interpretation, the Washington Attorney General's interpretation clearly prevails over that of the district court." Brief at 26 n.28. But in *Lynch* this Court rejected the Government's statutory interpretation that was "buttressed" by an analogous local court decision.

[42] *Cf. Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 693-95 (1979). The United States was not nearly so sanguine about the Washington Attorney General's representations in the *Salmon Case*. *See* Brief for the United States at 78, *Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra*.

Although school board members would be protected from personal liability *if* they had formal advice of the Attorney General as to the meaning of Initiative 350 *and if* they were correct as to the need for desegregation, that would not validate their actions if a court should interpret Initiative 350 or the need for desegregation differently. *State ex rel. Day v. Martin*, 64 Wash. 2d 511, 392 P.2d 435 (1964). A state court injunction ending desegregation assignments in mid-year would wreak havoc on the districts and the educational program. The mere threat of such injury and disruption would deter a district from acting.

Nor would the Attorney General's representation free board members from personal concern with violating the plain language of a state statute. As the Court of Appeals noted, enforcement of Initiative 350 is not entrusted only to the Attorney General or to private persons; it is a civil statute imposing its own "affirmative duty to comply." 633 F.2d at 1342 n.1, J.S. at B-4.

Most important, even under the State's expedient construction, a local school board would be protected only if it could prove to a court that it had previously engaged in purposeful segregation with a current significant effect. Only on this question, racial desegregation of the schools, must a local board justify its actions relating to student assignment in court by a preponderance of the evidence. Thus, appellants' "saving" construction is subject to the same suspect classification as the law they now attempt to rewrite. Further, the State contends that the reviewing court would be engaged in the "difficult proposition" of applying "elusive concepts" in determining whether unlawful segregation exists. Brief of Appellants at 41. Thus, even a school board willing to confess its past guilt, in spite of the open-ended ramifications of such a confession, could not be sure of being upheld in court.

4. *Initiative 350 Is Facially Overbroad*

Regardless of the Attorney General's desire to rewrite the plain language, the statute *on its face* prohibits conduct not just protected but required by the Constitution—*i.e.*, satisfaction of the affirmative duty to desegregate by a local school district absent court order. *Baggett v. Bullitt*, 377 U.S. 360, 373-74 (1964) (declaring statute unconstitutional on its face despite narrowing construction suggested by Washington Attorney General); *see Gooding v. Wilson*, 405 U.S. 518, 524 (1972). There should be no less concern with the effect of a facially overbroad law on satisfaction of the constitutional *duty* to desegregate than on exercise of the constitutional *right* to free speech. For that very reason, the present school districts have standing to assert the effect of the initiative both on themselves and on other districts that might have followed their example in desegregating through all necessary means but who might be deterred by Initiative 350 from doing so. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

In *North Carolina State Board*, this Court unanimously declared the relevant provision of an antibusing statute to be unconstitutional on its face—not just in its application to particular districts undergoing court-ordered desegregation. *See* 312 F. Supp. at 510. The Court found that the statute's "apparently neutral form" would deprive "school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." 402 U.S. at 45-46. Because "all reasonable methods" must be available, and because "it is unlikely that a truly effective remedy could be devised without continued reliance" on bus transportation, the antibusing statute "must inevitably conflict with the duty of school authorities to disestablish dual school systems." *Id.* at 46. The Court so held even though not all the state's schools were under court order and the district court had found that busing would not invariably be necessary to an effective remedy. 312 F. Supp. at 510.

The scope of the order upheld in *North Carolina State Board* indicates that the decision was not limited to school districts that had been judicially declared guilty of unconstitutional segregation which could be remedied only with non-neighborhood assignments. That understanding is confirmed by *McDaniel v. Barresi*, 402 U.S. 39 (1971), also decided unanimously the same day. In *McDaniel*, a state court had enjoined race-conscious student assignments in a non-court-ordered desegregation plan. This Court overturned that decision on the ground that satisfaction of the affirmative duty to disestablish unlawful segregation "will almost invariably require that students be assigned 'differently because of their race.' " *Id.* at 41.

5. *Initiative 350 is Preempted by Federal Legislation*

Even if the State is correct that there is no possibility of *unconstitutional* segregation in Washington schools, many schools would nonetheless be segregated in fact under Initiative 350. The initiative is therefore preempted by federal statutes that prohibit school segregation, regardless of cause, and that have the purpose of reducing such segregation.[43]

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), bans racial discrimination in programs receiving federal financial assistance. In *Lau v. Nichols*, 414 U.S. 563, 568 (1974), this Court interpreted Title VI as prohibiting discriminatory effect "even though no purposeful design is present." Although Title VI was interpreted as going no farther than the Constitution with respect to purposeful conduct *benefiting* minorities in *Regents of the University*

---

[43] Although this rationale was not relied upon in the Court of Appeals, the cause of action was stated in appellees' complaint, and "the prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). *See also New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979).

of California v. Bakke, 438 U.S. 265 (1978), a plurality of the Court in *Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980), described *Lau* approvingly as not requiring purpose. Moreover, interpreting Title VI as applying to disparate impact is consistent with Title VII of the same act. *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1330-31 (3d Cir. 1981) (en banc).

Regardless of the proper interpretation of Title VI as a general matter, its interpretation as to public school segregation has been determined by Congress. The Emergency School Aid Act specifies that Title VI "shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation." 20 U.S.C. § 3193(b) (Supp. III 1979).

This language is that of the version of the Stennis amendment analyzed by this Court in *Board of Education v. Harris*, 444 U.S. 130 (1979), as not requiring purpose. A different version of the Stennis amendment appears as part of Title VI, 42 U.S.C. § 2000d-6 (1976), and seems to preserve whatever distinction there might be between purposeful and nonpurposeful discrimination under Title VI. 444 U.S. at 146 n.10 and 150 n.13. But the language applying Title VI specifically to schools expressly leaves off the second half of that version and thus, with respect to school segregation, eliminates whatever distinction there might otherwise be. That is consistent with the regulations administering Title VI with respect to schools; those regulations do not require a showing of purpose. 34 C.F.R. § 100.3(b)(1)(iii) and (b)(2) (1981). *See generally* Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 Geo. L.J. 1 (1981).

Because mandatory student assignments were found in the circumstances here to be essential to desegregation, Initiative 350 violates and is preempted by Title VI. 42 U.S.C. § 2000h-4 (1976); *see Washington v. Washington State*

Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 695 (1979).

Moreover, Congress has separately stated its purpose to "encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students." 20 U.S.C. § 3192(b)(2) (Supp. III 1979). As this Court put it, the statute "indisputably demonstrates that Congress was disturbed about minority segregation and isolation as such, de facto as well as de jure . . . ." *Harris*, 444 U.S. at 141. By flatly prohibiting the voluntary action the statute seeks to encourage, Initiative 350 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

6. ***Conclusion***

The involvement of this Court and the lower federal courts in desegregating this nation's schools has been necessary but troubled. Court intervention increases resentment, decreases flexibility and community involvement, and both results from and contributes to delay. Seattle, Tacoma, and Pasco developed solutions that promised realistically to work, and to work now. If they cannot act absent court order, or if it is only uncertain whether they can act absent court order, there will be no action until the court takes control. The affirmative duty will be a nullity, and Washington school districts will rejoin those districts across the country that have abdicated responsibility to the courts on this vital national issue.

D. The Court of Appeals Correctly Found the Successful School District Plaintiffs Entitled to Their Costs and Attorney's Fees

The Court of Appeals properly reversed the District Court's denial of the school district plaintiffs' costs and

attorney's fees.[44] As the Court of Appeals recognized, Congress intended the applicable attorney's fees statutes to authorize the award of attorney's fees to publicly as well as privately funded plaintiffs, without regard to the ability of the State to pay. This is shown by the express language of the statutes and their purpose and legislative history.[45]

1. ***Statutory Bases for Award of Attorney's Fees***

The two statutes authorizing an award of fees here are 20 U.S.C. § 3205 (Supp. III 1979), a section of the Emergency School Aid Act, and 42 U.S.C. § 1988 (1976), the Civil Rights Attorney's Fees Awards Act of 1976.[46] Section 3205 provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988 is phrased similarly, but applies to violations of 42 U.S.C. § 1983 (1976), and other provisions.

The school district plaintiffs met all express requirements for the award of fees under these statutes. The District Court entered a final order against the State for violation of the

[44] The Court lacks appellate jurisdiction over this issue, since it does not involve the constitutionality of a state statute. 12 *Moore's Federal Practice* ¶ 435.01[2] (1981). Nor does this issue satisfy the considerations governing review on certiorari. Rule 17.1.

[45] In the courts below, the United States supported the school district plaintiffs' right to an award of fees.

[46] Section 3205 was codified at 20 U.S.C. §1617 prior to reenactment in identical form, effective October 1, 1979, as part of the Education Amendments of 1978, Pub. L. No. 95-561.

Fourteenth Amendment and § 1983. A violation of the Fourteenth Amendment is necessarily also a violation of Title VI. These proceedings were necessary to bring about compliance with federal law. Finally, the school district plaintiffs are prevailing parties other than the United States.

2. ***An Award of Fees Serves the Congressional Purposes***

No significant differences divide the language, purposes, or application of § 3205 and § 1988. As this Court has noted, the similarity of language between the provisions authorizing the award of attorney's fees under the Emergency School Aid Act and the Civil Rights Act of 1964 "is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973). As was true of the provisions construed by this Court in *Northcross*, § 3205 and § 1988 share "a common *raison d'etre*." 412 U.S. at 428. The enactment of both provisions was for the same purpose: to encourage enforcement of the law in these areas and to deter violations of such law. *See id.; Carey v. Piphus*, 435 U.S. 247, 258 n.11 (1978). Thus, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, Congress intended that § 1988 be given the same liberal construction that had been accorded the predecessor of § 3205. S. Rep. No. 94-1011, at 3 (1976).

In particular, Congress commanded that courts applying § 1988 adhere to the rule established by this Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), that the prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. 94-1011, at 4 (1976); H.R. Rep. No. 94-1558, at 6 (1976). At the time § 1988 was drafted, this Court had applied that standard to § 3205. *Northcross, supra*, 412 U.S. at 428. It has since been held applicable to § 1988. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980).

Thus, although the statutes entrust the *amount* of the fee award to the discretion of the district court, "the trial court's discretion is narrow." *Dawson v. Pastrick*, 600 F.2d 70, 79

(7th Cir. 1979), *cert. denied*, 450 U.S. 919 (1981). Absent special circumstances rendering an award unjust, there is no discretion to deny totally an award. *Id.* Such discretion "[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." S. Rep. No. 94-1011, at 3 (1976) (quoting from *Hall v. Cole*, 412 U.S. 1 (1973)).

3. ***No Special Circumstances Exist Here***

Nothing inherent in the mere circumstance that the legal services rendered here were publicly funded makes an award of attorney's fees unjust. The courts have held with substantial uniformity that government funding of plaintiffs' legal services is "irrelevant to the computation of attorney's fees." *Donaldson v. O'Connor*, 454 F. Supp. 311, 313 (N.D. Fla. 1978); *accord, Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978); *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 578 F.2d 34 (2d Cir. 1978); *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975); *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *Regalado v. Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978).

The school district plaintiffs requested the State of Washington to fulfill its duty to challenge or otherwise remove the constitutional infirmities of Initiative 350. Had the State responded, it would not now be liable for the school district plaintiffs' attorney's fees. Because the State did not respond, the school district plaintiffs were faced with a choice between complying with a statute they believed unconstitutional, in violation of constitutional duty and the board members' oaths of office, or vigorously challenging the statute, but only by temporarily diverting public funds (only a portion of which comes from the State) from direct education. The boards' choice to protect students' constitutional rights must not be considered a "special circumstance."

Had the school districts chosen to ignore their duty to comply with the Constitution, they would have been made defendants and would now share the State's liability for the attorney's fees and costs of the other plaintiffs. Without the legitimate expectation that a successful challenge of Initiative 350 would entitle them to their costs incurred in that challenge, these plaintiffs might have been reluctant to vindicate rights that Congress has deemed of "the highest priority." Moreover, even if a fee award were not necessary to encourage these plaintiffs to vindicate federal rights, "assessing fees against defendants in all circumstances may deter wrongdoing in the first place." *Dennis v. Chang*, 611 F.2d at 1306 n.12; *accord, Carey v. Piphus, supra.*

If Congress had intended school districts funded in part by states to divert their funds from education, it could have easily so stated, just as it did with respect to the United States as plaintiff. The State is asking this Court to write an exception into the plain language of the statutes based not on any policy reflected in the statutes themselves but on a countervailing policy of the State's "fiscal crisis." In effect, the State is asking the Court to put a price on civil rights, and weigh that price against the State's interest in the integrity of its treasury.[47] Congress was well aware of the limits of state resources when it enacted these statutes, yet no such exception was provided. S. Rep. No. 94-1011, at 5 (1976).[48]

The State's assertion that limited state budgets might outweigh Congress' policies of deterring constitutional violations and encouraging vindication of constitutional rights is a questionable proposition. More important, it is up to Congress, not this Court, to balance the competing considerations advanced here by the State. Current efforts by the State and others to convince Congress to amend these

[47] Instead, the possibility of fee awards should provide the State with an incentive to avoid unconstitutional action during fiscal crises.

[48] The State's suggestion that Congress exceeded its authority in this determination is refuted by *Hutto v. Finney*, 437 U.S. 678 (1978).

statutes to preclude fee awards to publicly funded entities, efforts that have specifically pointed to the result in this case, have so far been unsuccessful. This Court should reject appellants' plea that it do what Congress has refused to do: amend the statutes. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) (refusing to depart from plain language of § 1988).

4. ***An Award is Due Other Plaintiffs***

Even if the districts themselves were not entitled to an award of fees, the individual plaintiffs who brought this suit with them would be. The fact that the individual plaintiffs did not fund this litigation does not extinguish their right to attorney's fees. Antitrust and civil rights plaintiffs routinely obtain court awarded fees even though they had not expended any sums. In *Brandenburger v. Thompson*, 474 F.2d 885, 889 (9th Cir. 1974), the Ninth Circuit stated:

> [T]he fact that the plaintiff was not obligated to pay the ACLU for its services is not a bar to an award of attorneys' fees. All that is required is the existence of an attorney-client relationship . . . Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant.

Accord, H.R. Rep. No. 94-1558, at 8 n.16 (1976) ("a prevailing party is entitled to counsel fees even if represented by an organization").

CONCLUSION

The judgment of the Court of Appeals should be affirmed. Initiative 350 is unconstitutional, and the school district plaintiffs are entitled to their attorney's fees and other reasonable expenses.

DATED this 25th day of January 1982.

Respectfully submitted,

MICHAEL W. HOGE*
General Counsel
Seattle School District No. 1

CAMDEN M. HALL, P.S.*
G. RICHARD HILL
Foster, Pepper & Riviera
Special Counsel for all School District Plaintiffs

DAVID J. BURMAN
Perkins, Coie, Stone,
Olsen & Williams
Special Counsel for Seattle School District No. 1

*Counsel of Record